

SURIANI KEMPE & ORS v. KERAJAAN MALAYSIA & ORS

HIGH COURT MALAYA, KUALA LUMPUR

AKHTAR TAHIR J

[CIVIL SUIT NO: WA-24NCVC-2356-12-2020]

27 MAY 2021

CIVIL PROCEDURE: *Striking out – Application for – Application to strike out plaintiffs’ originating summons seeking declaration on proper applicability of art. 14(1)(b) of Federal Constitution – Whether first plaintiff had locus to bring action – Whether there was cause of action – Whether originating summons frivolous, vexatious, scandalous and abuse of court process – Rules of Court 2012, O. 18 r. 19*

CONSTITUTIONAL LAW: *Federal Constitution – Applicability – Plaintiffs’ originating summons seeking declaration on proper applicability of art. 14(1)(b) of Federal Constitution – Whether art. 14(1)(b) ought to be read harmoniously with art. 8 – Whether law ought to be applied without variance – Whether there were inconsistencies in citizenship provision regarding child born in Federation and child born out of Federation – Whether justifications necessary for court to make proper construction of provisions – Whether there ought to be proper evaluation of all facts and evidence*

The plaintiff’s originating summons (‘OS’) sought a declaration on the proper applicability of art. 14(1)(b) of the Federal Constitution (‘FC’) in line with the other provisions of the FC and more specifically to art. 8 of the FC. Article 14(1)(b) of the FC relates to citizenship by operation of law where there is a clear distinction between a child born in the Federation and a child born out of the Federation. A child born in the Federation automatically becomes a citizen by operation of the law if either parent is a citizen of the Federation, which is different for a child born out of the Federation where a child becomes a citizen only if the father is a citizen. In other words, a child born outside the Federation will not be granted citizenship even if the mother is a citizen of the Federation. The plaintiffs sought a declaration that art. 14(1)(b) read with Part II of the Second Schedule was discriminatory and therefore ran counter to art. 8 of the FC, which provides that all persons are equal before the law and entitled to the equal protection of the law. The plaintiffs were also seeking a declaration that both art. 14(1)(b) and art. 8 of the FC should be read harmoniously. In short, the plaintiff was seeking that the mother of the child be given equal rights as the father of the child born out of the Federation in bestowing citizenship to the child by operation of the law. The defendant applied to strike out the plaintiff’s OS under O. 18 r. 19 of the Rules of Court 2012 (‘ROC’) on the grounds that (i) the first plaintiff had no *locus* to bring this action; (ii) the plaintiffs had no cause of action; and (iii) the plaintiffs’ OS was frivolous, vexatious, scandalous and an abuse of the process of the court.

A Held (dismissing striking out application):

- (1) The first plaintiff was the President of a Woman's Association called Family Frontiers ('the association') which deals with the well-being of families in Malaysia. In relation to citizenship, the family life of families are distinguished between being a citizen and being non-citizens. The interest of the first plaintiff was derived from the fact that the second plaintiff to seventh plaintiff were members of the association and they were directly affected by the matter arising. The association had been properly registered under the law and the fact that it had been so registered reflected upon its importance and value to the association especially on the well-being of family units in the country. This was sufficient in establishing the interest of the association on the issues at hand especially as it was related to the wellbeing and upbringing of the child. Individual members of the association were themselves the affected parties. Thus, the first plaintiff had established interest in the matter to bring this matter to court. The defendant's objection to the participation of the first plaintiff was therefore dismissed. (paras 11, 12, 15 & 17-19)
- (2) The courts have an important role in constructing a provision of the law, however clear the wordings of the provisions are. The court's role is not merely to interpret the law but also to uphold justice. In upholding justice, however clear the words are, the court has a duty to interpret the words in a manner that upholds the values of the FC itself. Moreover, the plaintiff in a suit asking for declaration, a cause of action is not necessary. The plaintiffs had an interest and a right to safeguard their statutory rights and would clearly suffer if this rights were not upheld. Thus, the defendant's objection on the issue of cause of action was without any merits. (paras 21 & 23-25)
- (3) As much as citizenship provisions are important, so are provisions of fundamental liberties and even more so. The right of equality is a fundamental liberty of universal application and even transcends the law when necessary. Within the same provisions of the law, the law must be applied consistently and without variance. In the citizenship provisions itself, there seem to be inconsistency in the application of the provision between the child born in the Federation and the child born out of Federation. Although there is a distinction between the child born in the Federation, there is no apparent justification for such a distinction. The defendants must show justifications to convince the court the necessity to maintain the distinctions between a child born in the Federation and the child born out of the Federation. These justifications were necessary for the court to make a proper construction of the

citizenship provisions, in the light of the apparent discrimination of the father being given a superior right over the mother of a child. This justification would also answer whether the plaintiffs had a legitimate expectation to a citizenship of a child born out of the Federation. (paras 29, 30 & 32-34)

- (4) This was not a proper case to be summarily dismissed under O. 18 r. 19 of the ROC, without a proper evaluation of all the facts and evidence. The onus in fact, lay upon the defendant to justify the apparent distinctions between the father and mother of a child to be eligible of citizenship by operation of law. (para 35)

Case(s) referred to:

Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 CLJ 701 FC (*refd*)

Loh Kooi Choon v. Government Of Malaysia [1975] 1 LNS 90 FC (*refd*)

Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor [2021] 2 CLJ 579 FC (*refd*)

Tan Sri Hj Othman Saat v. Mohamed Ismail [1982] 1 LNS 2 FC (*refd*)

Legislation referred to:

Federal Constitution, arts. 8, 14(1)(b)

Rules of Court 2012, O. 18 r. 19

For the plaintiffs - Gurdial Singh Nijar, Joshua Andran, Abraham Au, Ngeow Chow Ying & Gan Pei Fern; M/s Joshua Alvin Khoo & Yong

For the defendants - SFC

Reported by Suhainah Wahiduddin

JUDGMENT

Akhtar Tahir J:

Introduction

[1] The defendants in this case applied to strike out the plaintiffs' originating summons ("OS") under O. 18 r. 19 of the Rules of Court 2012 ("the Rules").

The OS

[2] The plaintiffs' OS sought a declaration on the proper applicability of art. 14(1)(b) of the Federal Constitution in line with the other provisions of the Federal Constitution and more specifically to art. 8 of the Federal Constitution.

[3] Article 14(1)(b) of the Federal Constitution relates to citizenship by operation of law and states as follows:

- 1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:

- (a) every person born before Malaysia Day who is a citizen of the Federation by virtue of the provisions contained in Part I of the Second Schedule; and

- A (b) every person born on or after Malaysia Day, and having any of the qualifications specified in Part II of the Second Schedule.
(emphasis added)

[4] Part II of the Second Schedule provides as follows:

B **Citizenship By Operation Of Law Of Persons Born On Or After Malaysia Day**

1. Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say:
- C (a) every person born within the Federation of whose parents one at least is at time of the birth either a citizen or permanently resident in the Federation; and
- (b) *every person born outside the Federation whose father is at the time of the birth a citizen and either was born in the Federation or is at the time of the birth in the service of the Federation or of a State; and*
- D (c) *every person born outside the Federation whose father is at the time of the birth a citizen and whose birth is, within one year of its occurrence or within such longer period as the Federal Government may in any particular case allow, registered at a consulate of the Federation or, if it occurs in Brunei or in a territory prescribed for this purpose by order of the Yang di-Pertuan Agong, registered with the Federal Government; and*
- E (d) every person born in Singapore of whose parents one at least is at the time of the birth a citizen and who is not born a citizen otherwise than by virtue of this paragraph; and
- F (e) every person born within the Federation who is not born a citizen of any country otherwise than by virtue of this paragraph.
(emphasis added)

[5] Reading the provision as a whole there is clear distinction between a child born in the Federation and a child born out of the Federation. A child born in the Federation becomes an automatic citizen by operation of the law if either parent is a citizen of the Federation. This is different for a child born out of the Federation where a child becomes a citizen only when if the father is a citizen. In other words a child born outside the Federation will not be granted citizenship even if the mother is a citizen of the Federation.

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[6] In summary, what the plaintiffs are seeking is a declaration that the art. 14(1)(b) read with Part II of the Second Schedule is discriminatory and therefore runs counter to art. 8 of the Federal Constitution. Article 8 of the Federal Constitution provides as follows:

H

- (1) All persons are equal before the law and entitled to the equal protection of the law.
- I

- (2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment. A
- (3) There shall be no discrimination in favour of any person on the ground that he is a subject of the Ruler of any State. B
- (4) No public authority shall discriminate against any person on the ground that he is resident or carrying on business in any part of the Federation outside the jurisdiction of the authority. C
- (5) This Article does not invalidate or prohibit:
- (a) any provision regulating personal law;
 - (b) any provisions or practice restricting office or employment connected with the affairs of any religion or of an institution managed by a group professing any religion, to persons professing that religion; D
 - (c) any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service; E
 - (d) any provision prescribing residence in a State or part of a State as a qualification for election or appointment to any authority having jurisdiction only in that State or part, or for voting in such an election; F
 - (e) any provision of a Constitution of a State, being or corresponding to a provision in force immediately before Merdeka Day;
 - (f) any provision restricting enlistment In the Malay Regiment to Malays. G

[7] The plaintiffs are also seeking a declaration that both art. 14(1)(b) and art. 8 of the Federal Constitution should be read harmoniously.

[8] In short what the plaintiffs are seeking is that the mother of the child be given equal rights to the father of the child born out of the Federation in bestowing citizenship to the child by operation of the law. H

The Defendant's Grounds For Asking The OS Be Struck Out

[9] The defendant's application is made under O. 18 r. 19 of the Rules of Court 2012 which provides as follows: I

A 19. Striking out pleadings and endorsements (O. 18 r. 19)

(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:

- B** (a) it discloses no reasonable cause of action or defence, as the case may be;
- (b) it is scandalous, frivolous or vexatious;
- (c) it may prejudice, embarrass or delay the fair trial of the action;
- C** or
- (d) it is otherwise an abuse of the process of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

D (2) No evidence shall be admissible on an application under subparagraph (1)(a).

(3) This rule shall, as far as applicable, apply to an originating summons as if it were a pleading.

[10] The grounds of the defendant's application can be summarised into the following issues:

- E** (i) the first plaintiff has no *locus* to bring this action;
- (ii) the plaintiffs have no cause of action; and
- (iii) the plaintiffs' OS is frivolous, vexatious, scandalous and an abuse of the process of the court.

F *The First Plaintiff's Locus*

G **[11]** The first plaintiff is the President of a Woman's Association called Family Frontiers ("the association") a registered association under the Societies Act 1966. This association in short deals with the well-being of families in Malaysia.

H **[12]** In relation to citizenship the family life of families are disrupted by the fact that children born in the same families are distinguished between being a citizen and being non-citizens. The benefits enjoyed by child who is a citizen is obviously are much more than a child who is a non-citizen leading to imbalances within the families themselves.

[13] These imbalances have been aggravated by the Covid-19 pandemic especially on matters of travel in and out of the country.

I **[14]** The only reason given by the defendants in the affidavit-in-support of the application to strike out against the first plaintiff, is that the first plaintiff has no interest in the matter at hand and the plaintiffs' rights have not been prejudiced in any manner by the issue at hand.

[15] The first plaintiff contends that the interest of the first plaintiff is derived from the fact that the second to seventh plaintiffs are members of the association and they are directly affected by the matter arising. A

[16] In considering the issue of *locus standi*, discretion is given to the court to determine whether the party has an interest in the matter in issue. The various case laws have also advocated a common sense approach in determining whether the party has an interest in the matter. It is also important to look at the circumstances of the case and each case should be decided on the strength of its own facts on the issue of *locus standi*. B

[17] Apart from the facts in this case the court took note of the fact that the association has been properly registered under the law and the fact that it has been so registered reflects upon its importance and value to the association especially on the well-being of family units in the country. C

[18] This fact alone is sufficient in establishing the interest of the association on the issues at hand especially as it relates to the well-being and upbringing of the child. A further interest is based on the fact that individual members of the associations are themselves the affected parties. D

[19] Using its discretion the court in this case finds that the first plaintiff has an established interest in the matter to bring this matter to court. The defendants' objection to the participation of the first plaintiff is therefore dismissed. E

Cause Of Action

[20] The defendants' contention that there is no cause of action stems from the belief that the clear words of the constitution leave no room to the court to make any further construction to the meaning of the wordings. F

[21] This is a clear misnomer and belittles the role of the court. The courts have clearly an important role in constructing a provision of the law however clear the wordings of the provisions are. The court's role is not merely to interpret the law but also to uphold justice. In upholding justice, however clear the words are, the court has a duty to interpret the words in a manner that upholds the values of the Federal Constitution itself. G

[22] In fact, the case relied upon by the defendant of *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 CLJ 701; [2004] 2 MLJ 257 illustrates this point when at the beginning the Federal Court states that "The Constitution must be considered as a whole, and so as to give effect, as far as possible, to all its provisions". H

[23] Moreover, the defendants' contention that to succeed the plaintiffs must show a cause of action, is clearly untenable and misconceived. The court agrees with the submissions of the plaintiffs in a suit asking for I

- A declaration a cause of action is not necessary. This is clearly stated in the case of *Tan Sri Hj Othman Saat v. Mohamed Ismail* [1982] 1 LNS 2; [1982] 2 MLJ 177.
- [24] In this case the plaintiffs have an interest and a right to safeguard their statutory rights and will clearly suffer if this rights are not upheld.
- B [25] In short, the defendants' objection on the issue of cause of action is without any merits.
- Scandalous, Frivolous, Vexatious And Abuse Of Process Of Court*
- C [26] The defendants' basis for contending that the OS is scandalous, vexatious and abuse of the process of court is based on two grounds. The first is that no provision of the Federal Constitution can be declared invalid or inconsistent with each other and there is no issue of legal expectation.
- D [27] The defendants have relied on two cases to illustrate that that the Federal Constitution cannot be said to be at variance with itself and all articles of the Federal Constitution are of equal standing. The two cases are *Loh Kooi Choon v. Government Of Malaysia* [1975] 1 LNS 90; [1977] 2 MLJ 187; and *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579; [2021] 1 MLJ 750.
- E [28] The defendants' contention that all articles are of equal importance, has overlooked a very important point that all the provisions of the Federal Constitution must be given effect to and cannot be just ignored. The Federal Constitution must be read as a whole and not each article by itself.
- F [29] As much as citizenship provisions are important so are provisions of fundamental liberties and even more so. The right of equality is a fundamental liberty of universal application and even transcends the law when necessary.
- G [30] Another important principle which must be borne in mind is that within the same provisions of the law, the law must be applied consistently and without variance. In the citizenship provisions itself there seem to be inconsistency in the application of the provision between the child born in the Federation and the child born out of Federation.
- H [31] There might be instances where there appears to be distinctions between certain classes of people in the various provisions of the Federal Constitution and which might not be in consonance with other provision of the Federal Constitution but in such cases there are apparent justifications for such distinctions.
- I [32] In the case of the citizenship provision although there is a distinction between the child born in the Federation and the child born out of the Federation, there is no apparent justification for such a distinction.

[33] The defendants in this case must therefore show justifications to convince the court of the necessity to maintain the distinctions between a child born in the Federation and the child born out of the Federation.

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[34] These justifications are necessary for the court to make a proper construction of the citizenship provisions, in the light of the apparent discrimination of the father being given a superior right over the mother of a child. This justification will also answer whether the plaintiffs have a legitimate expectation to a citizenship of a child born out of the Federation.

B

Conclusion

[35] This is not a proper case to be summarily dismissed under O. 18 r. 19 of the Rules of Court 2012, without a proper evaluation of all the facts and evidence. The onus in fact, lie upon the defendants to justify the apparent distinctions between the father and mother of a child to be eligible of citizenship by operation of law.

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